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No. 90-657

In the

Supreme Court of the United States

October Term, 1990

KEMPER FINANCIAL SERVICES, INC.,

Cross-Petitioner,

v.

JILL S. KAMEN,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF CROSS-RESPONDENT JILL S. KAMEN

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QUESTION PRESENTED

Whether certiorari should be granted to review the finding of the Court of Appeals that plaintiff is an adequate shareholder representative where she is vigorously prosecuting an action to recover damages for the Fund, which recovery will benefit all shareholders?

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BRIEF IN OPPOSITION OF CROSS-RESPONDENT JILL S. KAMEN

STATEMENT OF THE CASE

In order to avoid repetition, cross-respondent Jill S. Kamen adopts the statement of the case contained in her petition for certiorari in No. 90-516. However, in order to comply with Rule 15.1 of this Court, it is necessary to set forth the following corrections of misstatements contained in the statement of the case in the cross-petition of KFS.

1. The cross-petition states (p. 3) that essentially all of the Fund's accounts are linked with securities trading accounts at brokerage firms. There is no evidence whatsoever in the record to support this, and in fact two of the

Fund's own directors testified on deposition that their Fund accounts were not linked with brokerage firms (App. 1).[1]

2. The cross-petition states (p. 3) that the sponsoring brokerage firms must be compensated for their efforts, with the result that broker sponsored money market mutual funds generally offer lower yields than other retail money market funds. Again, there is no support in the record for this statement, and the decided cases indicate that the contrary is true. Thus, in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983), the broker-linked fund there performed above the average (694 F.2d at 926) at a fee that was lower due to the fact that the brokerage firm gained large "fall-out" benefits, principally in the form of brokerage business from fund customers. (*Id.*, at 932). The same findings were made as to another broker-affiliated fund in *Krinsk v. Fund Asset Management, Inc.*, 875 F.2d 404 (2d Cir.), *cert. denied*, 110 S.Ct. 281 (1989).

3. The cross-petition, building upon *dicta* in the Court below, asserts (p. 9) that the plaintiff seeks to eliminate the fees for the special cash management services and, hence, presumably, eliminate those services themselves. The complaint seeks no such result. It prays for judgment requiring KFS to pay to the Fund damages resulting from a false proxy statement and from fees which were "completely disproportionate to the services rendered in return therefor." (92a).

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[1] "App." refers to the appendix attached to this brief in opposition.

4. Contrary to cross-petitioner's assertions (p. 4 n. 2) that plaintiff was ignorant of the facts underlying the lawsuit, she demonstrated upon her deposition that she knew the investment objectives of the Fund, compared the yield of the Fund to those of comparable investments (utilizing a calculator), discussed the results with her father and retained experienced counsel who vigorously prosecuted the litigation (App. 2-3).

5. The cross-petition asserts (p. 4) that it is undisputed that, in the seven years that plaintiff has maintained a Fund account, she has never used any of the cash management services associated therewith. However, the plaintiff's deposition was taken in 1986. The record does not show the nature of services utilized by her in the four years since then.

REASONS FOR DENYING THE WRIT

NO VIOLATION OF THE DUE PROCESS CLAUSE ARISES WHERE, AS HERE, THERE IS NO CONFLICT OF INTEREST BETWEEN THE PLAINTIFF AND THE OTHER SHAREHOLDERS OF THE FUND

KFS contends that Kamen is an inadequate representative because her interests conflict with those of other shareholders. KFS relies upon *Hansberry v. Lee*, 311 U.S. 32 (1940).

In *Hansberry*, this Court held that a judgment obtained by landowners enforcing a restrictive racial covenant was not binding upon other landowners whose substantial interest was in resisting performance and who had not received notice of the earlier action. There was, in

other words, a direct conflict between landowners who sought enforcement of the restrictive covenant and those who claimed it was invalid.

In the present case, there is no such conflict. As shown above (p. 2), the complaint does not seek to eliminate or reduce any services. Rather, it asks for judgment requiring KFS to pay damages to the Fund, a result which will benefit all shareholders. As the Court of Appeals observed (26a):

> . . . shareholders have a common interest in ensuring that the Fund pays Kemper no more than the extra services are worth. Commonality of interest is the essence of adequate representation. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975).

The Court found that all shareholders of the Fund shared the wish for a higher return. (*Id.*).

KFS contends that, if Kamen is successful, the result may be a reduction or elimination of services which other shareholders desire. Under this concept, no action could ever be brought under Section 36(b), for the same argument would be available to every defendant. An investment adviser could claim that a judgment against him would force him to reduce services desired by other shareholders. Needless to say, KFS cannot support this absurd proposition.

Since there is no conflict of interest between plaintiff and the other shareholders, she is an adequate representative.[2]

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[2] The Court of Appeals noted (24a) that none of the other shareholders objected to plaintiff's maintenance of the action.

(Continued on following page)

Accordingly, it is unnecessary to reach the constitutional question.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Dated: New York, New York
November 1, 1990

Respectfully submitted,

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Those shareholders were notified of plaintiff's claims in this litigation. (Cross-pet. 4 n.1).

APPENDIX

Deposition testimony of director Donald L. Dunaway (pp. 96-97):

Q. Right. And in the case of Cash Equivalent Fund, the shareholders of record are brokerage firms for the most part, isn't that correct?

A. I don't know.

Q. You don't know that?

A. No, sir. My shares in Cash Equivalent Fund are not held in broker name, so I vote my shares.

Q. Do you own your shares through a brokerage firm?

A. No.

Q. You own them directly?

A. Yes, sir.

Deposition testimony of director David W. Belin (pp. 7-8):

Q. Are you a stockholder of Cash Equivalent Fund?

A. Yes, sir.

Q. What is the approximate extent of your investment?

A. I'm going to ballpark it, $1,500, less than $2,000 probably.

Q. Is that through a brokerage firm?

A. I think I've actually made my investment in the Cash Equivalent Fund directly through Kemper Financial Services.

Deposition testimony of plaintiff Jill S. Kamen (pp. 10, 13, 14-15):

Q. What do you understand the purpose of Cash Equivalent Fund to be?

A. I understand them to – because I am not in the financial field I can't monitor if I were to do my own personal investing, so I look to them as a vehicle to search out the best way of investing my money to get it to grow. That's what I see them, money managers.

* * *

A. I was in school in some business classes and we were discussing financial tools and other things and one of the things that we were asked to do was look over some of our own investments if we had any to ask questions or what have you on the documents, and which we all had many, and one of them that I came up was how they came about with my net. All I was interested in was my net rate of return, and it just seemed a little low in my thoughts as to what it should have been based on the interest rates at the time. This was awhile ago so I asked my father some questions.

* * *

Q. You made a reference to asking questions on documents.

A. You know, like we – if we had any questions, it was like a class discussion, you know. You know, looking at things, asking questions, like what does this mean, what is a portfolio, very basic business questions, but as I was looking at my own, and I didn't bring this up – the issue in the class was not, you know, do you feel your investments are wise or anything, it was just look at the vocabulary. It was a vocabulary class. While I was looking at my particular one and I figured out on my calculator I just – I thought I knew what the interest rates were at

the time and I wanted to know more than speculating that there was anything wrong. I wanted to know how they came up with mine versus what the rate is everyday.